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Expert Testimoney and Opinion Evidence in a Narcotics Prosecution

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MEMORANDUM of LAW

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Introduction: Experts in General

Courts in New York have admitted expert testimony when "it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of a typical juror." *People v. DeLong* 60 NY2d 296 (1983). More specifically, in making such a determination, the trial court must consider [1] "when jurors are able to draw conclusions from the evidence based upon their day-to-day experience, their common observation and their knowledge, [2] and when they would be benefited by the specialized knowledge of an expert witness." *Cronin* at 433. The Court of Appeals has recognized that such testimony "*necessarily enters upon the jury's province, since the expert – and not the jury – draws conclusions from the facts*" [Italics added]. The admission of such testimony as well as its bounds are within the discretion of the Court. See also *People v. Lee* 96 NY2d 157 (2001).

Expert Testimony in Narcotics Prosecutions

Federal Case Law Analysis

Federal and New York State courts have permitted expert testimony in narcotics cases to describe the structure of narcotics distribution networks as well as to decode and explain drug terminology utilized by the traffickers. It is instructive to begin with a review of four federal cases from the Second, Fifth and Ninth Circuits:

United States v. Dukagjini 326 F.3d 45 (2nd Cir. 2003) cert. denied *Griffin v. United States* 541 U.S. 1092 (2004) was a seminal case in formulating the current rules for expert testimony in narcotics prosecutions. After cooperating civilian witnesses testified about the drug organization and structure, the prosecution called and qualified a law enforcement agent to testify about two areas: first, the meaning of words of the trade and jargon; and second, the general practices of drug dealers. The Court ruled that the expert was not to make "sweeping conclusions" and offer interpretations of entire telephone conversations.

The expert in Dukagjini testified based upon his review of the intercepted calls, his overall experience, as well as on *hearsay* information received from cooperating witnesses and other agents. From that foundation he proceeded to interpret the *particular* code used in this case. Significantly, the Court noted that a number of his opinions were phrased speculatively by his use of the term "probably".

With this record, the Second Circuit reiterated that, consistent with the New York rule set forth in *Long* and *Cronin supra*, expert testimony is permissible in the trial court's discretion if it will "'assist the trier of fact to understand the evidence or determine a fact in issue.'" *Dukagjini* at 51. The Court also stated that experts may explain the operations of drug dealers as well the "meaning of coded conversations about drugs…[recognizing] that drug dealers often camouflage their discussions." *Dukagjini* at 52.

Therefore, *Dukagjini* held that expert testimony in a drug trial is permissible since drug dealers can be quite "opaque" in their operations and use deliberately ambiguous jargon.[1] The expert may properly interpret and explain drug jargon in general as well as coded language that is *unique or specific* to the particular case. Where there is no evidence that phrases have fixed meanings either in the drug world or within a particular conspiracy, the expert may interpret those phrases as well; in such a case, the expert must explain the methodology utilized to decode the jargon. *Dukagjini* at 54-55, 58. Hearsay is admissible when explaining the basis for the methodology. For example, hearsay statements by fellow agents, civilians and cooperators from past cases all relate to and help form the basis for his expert testimony in the current case. Last, the expert is further allowed to identify the drug referred to by the coded jargon. *Id* at 52-53.

The Court in *Dukagjini* made it clear that inadmissible testimony includes sweeping conclusions about the overall meanings of conversations, the interpretation of commonly understood terms that are within a layman's vernacular, and testimony that amounts to a generalized summation of the case. *Id* at 54. The Court also prohibited testimony based upon hearsay within the current case such as statements by cooperating witnesses and fellow agents.

In cases where expert testimony is admitted, the jury is still free to determine the sufficiency of the coded terms as they relate to the sufficiency of the evidence and the guilt of the defendant. It is noteworthy that despite the errors at the trial level, the Court held that the

[1] Indeed, cross-examination of the expert that attacks his interpretations of code belies the self-explanatory nature of the coded jargon. *Dukagjini* at 52.

admission of the overly broad expert testimony constituted harmless error. This testimony included sweeping conclusions, generalizations beginning with the word "probably", and opinions that appeared to be tailored in an effort to bolster testimony of civilian witnesses.

United States v. Mejia 545 F.3d 179 (2nd Cir. 2008) was decided five years after *Dukagjini*. Here the Court expanded slightly on its general reasoning in *Dukagjini* and clarified the "two distinct ways in which the officer expert might 'stray from the scope of his expertise.'" *Mejia* at 192. First, the Court likened the expert to an anthropologist, someone "equipped by education and fieldwork to speak to the cultural mores of a particular group." Similarly, "law enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon, and cultural structure of criminal organizations." *Id.* at 190.

Although an expert may testify to coded meanings, he is not allowed to testify to the "meaning of conversations in general." Nor may the expert interpret ambiguous terms *unless* his testimony is based upon the "fixed meaning" of those terms in either the general narcotics world *or within the particular conspiracy. Id*. at 193. Once again, the Court held that the admission of expert testimony which exceeded these bounds was harmless error. In *Mejia,* the expert improperly gave summary testimony of the facts and further interpreted ambiguous slang terms without stating their fixed meaning either generally or in this particular case.

United States v. Akins 746 F.3d 590 (5th Cir.) cert. denied 135 S. Ct. 707 (2014) citing *Dukagjini* specifically allowed for the expert decoding of drug slang utilized in the particular case at bar. The key to the admissibility is the use of a methodology by the expert as opposed to making bare and 'sweeping conclusions' that impinge upon the jury's role. Evaluating the admissibility of such testimony and monitoring the course thereof requires diligence on the trial court's part as well as the use of proper jury instructions.

Last, in *United States v. Freeman* 498 F.3d 893 (9th Cir. 2007) the Court again cited to *Dukagjini* and upheld the admission of expert interpretation of coded jargon. In summary, the Court held that expert interpretation of commonly used phrases in the drug world, and uncommonly used phrases both simple and more unique, was properly admitted so long as it was based upon a stated methodology. Uncoded but ambiguous terms were also subject to expert interpretation if it were based upon the expert's knowledge of the specific case. To avoid juror confusion, the trial court must employ "vigilant gatekeeping" to ensure that the jury understands the limits/parameters of the expert's opinions. *Freeman* at 904.

New York Case Law Analysis

New York courts have historically permitted expert testimony in narcotics cases. *See People v. Brown* 97 N.Y.2d 500 (2002); *People v. Artis* 63 A.D. 3d 1173 (2nd Dept.) leave denied 13 N.Y.3d 834 (2009); *People v. Ramirez* 33 A.D.3d 460 (1st Dept.) leave denied 7 N.Y.3d 928 (2006). In fact, the Court of Appeals has acknowledged that "it cannot be said that the average juror is aware of the specialized terminology used in the course of narcotics street sales." *Brown* at 505. It is clear then that expert testimony may be necessary and properly admitted in a narcotics trial.[2] The caveat has been that the expert must be duly qualified, and he may not offer testimony that is either speculative in nature or contains an opinion as to the defendant's guilt. *People v. Ramirez* at 461.

The Court of Appeals most recently ruled concerning such testimony in *People v. Inoa* 25 N.Y.3d 466 (2015). *Inoa* affirmed the First Department ruling permitting expert testimony about interpreted coded jargon and unexplained language utilized in recorded conversations.[3] In affirming this ruling, the Court of Appeals offered a more detailed analysis of expert testimony and its permissible bounds. A brief recital of the trial facts is instructive.

Inoa and his co-defendant Gutierrez were charged with murder; Gutierrez ordered it and Inoa carried it out. The testimony of civilian witnesses was combined with intercepted jail calls by Gutierrez to prove the case. The prosecution also called an expert to interpret the calls and their meanings. The expert was familiar with Gutierrez's gang, their voices and their "lingo". At trial, he decoded jargon that was consistently used by Gutierrez and his callers *in this case*.

Upon review, the Court of Appeals was troubled by the expert's testimony concerning phrases that were veiled in their reference but not encoded per se. Case-specific testimony was not at issue; the Court was took issue with the fact that his testimony did not appear to be *based upon* any general expertise. The expert drew conclusions based upon hearsay sources such as civilian witnesses and other case agents; he then harmonized the calls with said testimony. Ultimately he was allowed to testify in sweeping general terms.

The Court ruled as follows: first, expert testimony is admissible in the trial court's discretion. It is therefore improper for a court to dismiss out of hand a request for such

[2] Expert testimony is admissible in both street-level cases and large-scale narcotics cases. *People v. Lantigua* 86 A.D.3d 429 (1st Dept.) leave denied 21 N.Y.3d 1005 (2016).
[3] *People v. Inoa* 109 A.D.3d 765 (1st Dept. 2013)

testimony.[4] Citing *Dukagjini*, *Mejia* and *Freeman* as to the extent of *permissible* expert testimony, the Court stated affirmatively that an expert may testify "about the meaning of conversations in general, *beyond the interpretation of code words*…the expert might 'interpret[ ] *ambiguous slang terms'* based on knowledge gained through involvement in the case, rather than by reference to the 'fixed meaning' of those terms 'either within the narcotics world *or within this particular conspiracy.'"* [emphasis added] *Inoa* at 474.

The Court limited such testimony in that an expert is not to testify as a "summation witness" offering instruction to the jury as to the guilt of the defendant. The expert may properly testify to encoded conversations but he may not be the "omniscient expositor of the facts of the case." *Inoa* at 473. Finally, the expert may not premise his testimony upon the "out-of-court" hearsay statements of others. It is further noteworthy that, despite the improper leeway granted to the expert at trial, the error was deemed harmless and the conviction was upheld.

Subsequent to *Inoa*, the First and Third Departments have similarly upheld expert testimony in drug cases stating that narcotics code and jargon are beyond the normal ken of an average juror; summary testimony or testimony based upon inadmissible hearsay, meanwhile, is not allowed. And the jury may accept or reject the expert's opinion.[5]

Of note are two subsequent decisions by the Second Department, *People v. Melendez* 138 A.D.3d 758 (2016) and *People v. Guzman* 153 A.D.3d 1273 (2017). In each case the Court ruled that expert testimony exceeded the ruling in *Inoa*; nevertheless the errors were deemed harmless and each conviction was upheld. Melendez and Guzman were co-defendants who each appealed his conviction after trial. Citing *Inoa* at 474, the *Melendez* Court, quoting from *Inoa,* correctly ruled that the expert's testimony was permissible as to terms with a "'fixed meaning…within the narcotics world (*Inoa* at 474).'" *Melendez* at 759. However, in so quoting, the Court omitted the remaining phrase in that sentence, "*or within this particular conspiracy*" [emphasis added]. Melendez at 759.

Hence, according to *Inoa*, if terms have a *fixed meaning in general or in a particular conspiracy*, expert testimony *is* permissible concerning its meaning. Further, in the sentence preceding that holding, *Inoa* again referred to the federal cases noted above and held that

[4] Indeed, the failure to exercise the court's discretion is reviewable on appeal. *Inoa* at 472

[5] See *People v. Williams* 150 A.D.3d 1315 (3rd Dept. 2017), *People v. Anderson* 149 A.D.3d 1407 (3rd Dept.) leave denied _N.E.3d _ (2017) and *People v. Murray* 148 A.D.3d 649 (1st Dept.) leave denied 29 N.Y.3d 1084 (2017).

testimony concerning the particular language of drug traffickers is admissible if it is supported by a quantifiable methodology utilized by the expert.[6] The *Guzman* ruling follows the same analysis.

Conclusion

New York follows the federal analysis and guidelines for the admissibility of expert testimony in a drug case. Drug jargon and ambiguous terms are generally beyond the ken of the average juror; hence, it is in the court's discretion to permit expert testimony to interpret such terminology. The expert may testify to the meaning of words with a fixed meaning either in the general world of narcotics or within the particular conspiracy. In the latter instance the expert's testimony must be based upon an identifiable methodology utilized in that case. The jury may properly be instructed to weigh the expert's testimony as it would that of any other witness; it is free to accept or reject it, in whole or in part. In no circumstance, however, may the expert testify as a summation witness nor may he base his expert testimony upon the hearsay statements of others.

[6] *Inoa*, referring in particular to *Mejia* 545 F.3d at 192-193. *Dukagjini*, *Freeman* and *Akins* follow the same logic.